

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Carriage of Digital Television Broadcast) CS Docket No. 98-120
Signals)
)
Amendments to Part 76)
of the Commission's Rules)
)
Implementation of the Satellite)
Home Viewer Improvement Act of 1999:)
)
Local Broadcast Signal Carriage Issues) CS Docket No. 00-96
)
Application of Network Non-Duplication,) CS Docket No. 00-2
Syndicated Exclusivity and Sports)
Blackout Rules to Satellite)
Retransmission of Broadcast Signals)

To: The Commission

COMMENTS OF
THE NATIONAL HOCKEY LEAGUE
AND THE PGA TOUR, INC.¹

The National Hockey League ("NHL") and the PGA TOUR, Inc. ("the TOUR")
(collectively, the "Sports Event Programmers"), by their undersigned counsel, and pursuant to
Section 1.415 of the rules of the Federal Communications ("FCC" or "Commission"),² hereby

¹ The National Football League ("the NFL") has informed the Sports Event Programmers that it intends to participate in this proceeding. The Sports Event Programmers have provided the NFL with a draft of these comments, and the NFL has indicated that it agrees with the views expressed herein by the Sports Event Programmers.

² 47 C.F.R. § 1.415.

submit these comments in response to the *Further Notice of Proposed Rule Making* in the above captioned proceeding.³

I. INTRODUCTION AND STATEMENT OF INTEREST

In the *Notice*, the Commission seeks comment on a panoply of issues that will govern the carriage of digital television (“DTV”) on cable systems pursuant to the Cable Television and Consumer Protection and Competition Act of 1992 (“Cable Act”). Of particular relevance and importance to the Sports Event Programmers is the Commission’s inquiry into what kinds and forms of digital programming content constitute “program-related” material that is subject to carriage under the Cable Act.⁴

The Sports Event Programmers represent some of the leading professional athletes and events in the country:

- *The National Hockey League*, with 30 teams in the U.S. and Canada, has five-year national contracts with ABC and ESPN, as well as four national contracts with Canadian networks, for regular season and playoff telecasts. In addition, all clubs televise regular season games locally, using over-the-air television or cable.
- *The PGA TOUR* operates three tours: the PGA TOUR, the SENIOR PGA TOUR, and the BUY.COM TOUR, and co-sanctions the World Golf Championships. The TOUR is the exclusive copyright holder of coverage of all these events and has licensed rights for the 1999-2002 period to the ABC,

³ *In re Carriage of Digital Television Broadcast Signals, Amendment of Part 76 of the Commission’s Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, CS Dockets No. 98-120, 00-96, and 00-2, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 01-22 (rel. Jan. 23, 2001) (“*First Report and Order*” and “*Notice*”).

⁴ See 47 U.S.C. § 534(b)(3)(A).

CBS, and NBC broadcast networks (as well as ESPN, USA Networks, The Golf Channel, and FoxSportsNet as cable and satellite distributors).⁵

The Commission's inquiry into the definition of program-related content goes to the heart of the development of digital sports programming. Perhaps more than any other popular programming, sports event programming is particularly well suited to take advantage of digital technologies to produce a more involved and engaging experience for consumers. Indeed, technology is beginning to change fundamentally the nature of sports event programming. Traditionally, coverage of sports events has consisted primarily of audio/visual depiction of the event, interspersed with commentary and analysis. Today, however, sports event programming features enhanced elements such as constantly updated statistics delivered in real time and panoramic camera angles that give fans dynamic views of the action. In the digital environment, the Sports Event Programmers will be able to present to viewers further-improved levels of coverage and analysis.

The Commission has already expressly found that certain enhancements to sports event programming, such as multiple camera angles, are entitled to carriage under the Commission's existing standard for "program-related" content. The Sports Event Programmers support this decision and believe that the Commission's existing standard for "program-related" content is sufficiently flexible to adapt to the digital environment. The Commission has recognized that "digital television offers the ability to enhance video programming in a number of ways"⁶ and

⁴ See Joe Schlosser and David Carter, *TV Sports: A Numbers Game*, BROADCASTING AND CABLE, April 2, 2001.

⁶ See Notice at ¶ 122.

seeks additional information regarding what constitutes “program-related” content in the digital context.

As these Comments demonstrate, digital technology offers a wealth of opportunities for the Sports Event Programmers to enhance their programming for the benefit of their viewers. Indeed, the boundaries of conceivable digital enhancements are more likely to be set by consumer demand than by technological limitations. Ensuring that the digital enhancements will be subject to carriage as part and parcel of the sports event broadcast will encourage sports programmers to invest in these new technologies to the benefit of consumers.

II. THE COMMISSION ALREADY HAS AN APPROPRIATE STANDARD FOR DETERMINING WHETHER CONTENT IS “PROGRAM RELATED”

The statutory predicate for the requirement that cable operators carry “program-related” content is found in Section 614 of the Cable Act.⁷ In adopting a regulatory regime to implement Section 614, the Commission began with the three-part test for “program relatedness” enunciated in *WGN Continental Broadcasting Co. v. United Video Inc.*⁸ Under the *WGN* test, as adopted by the Commission, content is deemed to be “program related” if:

- (1) the broadcaster intends for it to be seen by the same viewers who are watching the video signals;
 - (2) it is available during the same interval of time as the video signals;
- and

⁷ See 47 U.S.C. §534(b)(3)(A) (stating that “a cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and ... program-related material carried in the vertical blanking interval”).

⁸ *WGN Continental Broadcasting Co. v. United Video Inc.*, 693 F.2d 622 (7th Cir. 1982) (stating that a copyrighted television program includes “program-related” material).

(3) it is an integral part of the video program.⁹

At the time the Commission adopted its standard for “program related,” it recognized that carriage of content in the vertical blanking interval (“VBI”) was, like the current state of digital technology, “rapidly evolving.”¹⁰ Therefore, the Commission did not find itself hide-bound by the specific limitations of *WGN*. The Commission clarified in 1994 that “the factors set forth in *WGN* do not necessarily form the exclusive basis for determining program-relatedness.”¹¹ Finding that “there will be instances where material which does not fit squarely within the factors listed in *WGN* will be program-related under the statute,”¹² the Commission determined that material may be “program related” if it “constitutes information intrinsically related to the particular program received by the viewer.”¹³ The Commission relied on this broader standard to compel carriage of Source Identification (“SIDS”) Codes, which are embedded in the broadcast signal and used to determine Nielsen ratings information. Because these SIDS codes, as created, are not intended to be seen or accessed by the viewer, by definition they did not meet the *WGN* criteria. Nevertheless, the Commission held that they were such an intrinsic part of the programming that they were program related. Precisely the same flexible considerations should govern the Commission’s consideration of “program related” in the digital context.

⁹ *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues in MM Docket No. 92-259, Report and Order*, 8 FCC Rcd. 2965, 2986 (1993).

¹⁰ *Id.*

¹¹ *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues in MM Docket No. 92-259, Memorandum Opinion and Order*, 9 FCC Rcd. 6723, 6734 (1994) (emphasis added).

¹² *Id.*

¹³ *Id.*

III. THE COMMISSION HAS ALREADY RECOGNIZED THAT ENHANCED SPORTS-PROGRAMMING CONTENT FALLS WITHIN THE COMMISSION'S DEFINITION OF "PROGRAM RELATED."

In the *First Report and Order* in this proceeding, the Commission applied the existing standard to determine that certain digital enhancements to sports event programming are explicitly "program related" and subject to mandatory carriage.

With the advent of digital television, broadcast stations now have the opportunity to include in their video service a panoply of program-related content. Indeed far more video content is possible broadcasting a digital signal than broadcasting in an analog format. For example, a digital television broadcast of a sporting event could include multiple camera angles from which the viewer may select. The statute contemplates and our rules require that cable operators provide mandatory carriage for this program-related content.¹⁴

It is important to stress that digital enhancements to sports event programming will not be confined to multiple camera angles. The paramount commercial concern of the Sports Event Programmers is to increase viewer interest in, and enjoyment of, the sports telecasts while, at the same time, preserve and increase the value of their proprietary sports event programming (*i.e.* telecasts of sports events). As generally described in the next section, the Sports Event Programmers intend to develop a broad array of "program-related" enhancements specifically designed to achieve these goals.

IV. THE EXISTING "PROGRAM-RELATED" STANDARD IS WELL SUITED TO THE EVOLVING NATURE OF DIGITAL TELEVISION AND SPORTS EVENT PROGRAMMING

Digital television can be thought of as an evolution in programming similar to the development of color broadcasts. Development of this enhanced form of transmission does not require significant, if any, modification of the existing standard for determining whether content is

¹⁴ *First Report and Order* at ¶ 57 (emphasis added).

“program related.” Indeed, the Commission seems to have concluded as much by applying the existing standard to conclude that digital enhancements to sports event programming are “program related” and therefore subject to mandatory carriage. The fact that the Commission so readily seized upon sports event programming to illustrate how digital enhancements can be “program related” demonstrates how well-suited sports event programming is to the advances presented by digital television.

Digital broadcasting capability will lead to a number of programming improvements that augment televised coverage of sports events and enhance the viewing experience. These improvements will allow sports event programmers to present the event more vividly, to make the event easier to understand for newcomers to the sport, and to provide added depth to fans already indoctrinated in the complexities of the game.

For example, as the Commission has already pointed out, multiple camera angles will be available. This means that viewers will be able to choose different vantage points throughout a game to get closer to the action. They could choose between watching from behind the goal or from center ice during a power play.¹⁵ The PGA TOUR event might provide one camera angle following the leader from behind, while another watches the ball approach the green.

Fans will also be able to select “isolation views” that follow particular participants for portions of the event. During a golf tournament, for example, viewers could follow favorite players, or if they prefer, watch many players at a single hole. What is perhaps most significant about such developments is that programmers will be able to offer fans a choice of views. Thus,

¹⁵ Indeed, ABC’s Panasonic Scanvision, which has already been used in the Stanley Cup Finals, places 30-or-so robotic cameras in a 180-degree arc from behind one goal to behind the other. Tom Hoffarth, *Problems Not Going Away*, THE DAILY NEWS OF LOS ANGELES, June 1, 2001, at S2; Sam Adams, *ABC to Have All Angles of Avs-Devils Covered*, ROCKY MOUNTAIN NEWS, May 31, 2001, at 2C.

to a certain extent, fans will become their own directors, choosing what images to view, what information to access, how to use that information, or perhaps even what combination of images and information to access in a split-screen format.

Fans will also no longer need to rely exclusively on the ability of announcers to describe all the salient and often complex factors that go into any particular play. Digital broadcasts will allow programmers to provide rich data.¹⁶ Such material could be displayed textually or graphically, and could provide play-by-play information or contextual statistics. Thus, a golf fan might choose to list shot information (what club the player is using and the specifications of that club); statistical information (how the player has done on this hole on previous days or in previous years); video highlights (how did the player play this hole yesterday, have there been any great shots in the past on this hole); and graphic enhancements of the course (more visible depictions of the fairway contours, thick rough, and undulating greens).

In addition to different camera views and enhanced statistical information, digital enhancements will allow viewers to access and use increased levels of analysis presented in new ways. During NHL broadcasts, voice-over analysis from the booth could be accompanied by graphic overlays of the action on the ice. Indeed, fans will have the choice whether to access and use this enhanced information and analysis. So for example, the NHL may be able to provide detailed analysis and explanation of the action (presented in a combination of text and graphics)

¹⁶ The PGA TOUR's ShotLink system is already capable of "collecting and disseminating scoring and statistical data on every shot by every player, real-time, during every tournament round," including yardage, club selection, and success with that club from that distance with that lie. Wendy Smith, *ShotLink Gives Instant Access to Golfer's Play*, THE TENNESSEAN, June 2, 2001, at 3C. Similarly, the Trakus system, which was used during the NHL All-Star Super Skills competition, incorporates chips inside helmets to provide real-time statistics such as how fast and how far players skate. Kevin Paul Dupont, *NHL All-Stars Patched Into Future*, THE BOSTON GLOBE, Feb. 3, 2001, at G1.

designed to introduce the sport to new viewers. However, aficionados of the game could disable these basic tutorials in favor of more sophisticated analyses and statistics.

All of these potential enhancements fall squarely within the three factors of the *WGN* test: the views (whether angles or isolation) and the data (whether textual or graphic, play-by-play or contextual) are intended for the same viewers who are watching the video signals, are available during the same interval of time as the video signals, and are an integral part of the video program.

But these are relatively straightforward “tweaks” on present-day features of existing sports event programming. The development of DTV will likely lead to innovations we cannot yet conceive of. Fortunately, the existing “program-related” standard is sufficiently robust to evolve with the dynamic digital environment. As discussed above, the FCC recognized the need for flexibility in the test for determining whether content is “program related,” and so adopted the expanded test, which encompasses “information intrinsically related to the particular program received by the viewer.”

V. CONCLUSION

In addressing the “program-related” standard in the digital context, the FCC need not be concerned that the entire universe of digital programming is not yet defined. Nor need the FCC now confront questions regarding the methods and specific technologies that will be used to deliver digital programming. The Commission developed the “program-related” standard to function in an environment in which “[c]arriage of information on a station’s VBI [was] rapidly evolving” and the Commission “believe[d] no hard and fast definition [could] be developed.”¹⁷ As a result, the existing standard will serve the Commission well as digital programming evolves.

Respectfully Submitted,

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¹⁷ *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues, Report and Order*, 8 FCC Rcd. 2965, 2986 (1993).